No. 20130110

State of North Dakota
In the Supreme Court

Stanford A. Reep and Amy Reep, the Stockman Family Mineral Trust, the Charles and Ruth Patch Trust, Heidi McGillivray, Julia Streich, Mary Beth Ferguson, Florence Irwin *ex rel*. Loren Irwin, her guardian and conservator, and Loren Irwin, Individually, Thomas Selby, and Sogard Davidson Mineral LLLP, and on Behalf of All Others Similarly Situated,

Appellants,

v.

State of North Dakota; North Dakota Board of University and School Lands; and North Dakota Trust Lands Commissioner Lance D. Gaebe, in his official and personal capacities,

Appellees

APPEAL FROM FINAL JUDGMENT IN THE DISTRICT COURT
NORTHWEST JUDICIAL DISTRICT
Williams County Case No. 53-2012-CV-00213
Honorable David W. Nelson

Brief of the Appellants

Robins, Kaplan, Miller & Ciresi L.L.P.
Jan M. Conlin (N.D. No. 07268)
Richard B. Allyn (P01120)
Sara A. Poulos (P001140)
Aaron R. Fahrenkrog (P01122)
2800 LaSalle Plaza
800 LaSalle Avenue
Minneapolis, MN 55402
Phone: (612) 349-8500

Crowley Fleck PLLP
John Morrison (N.D. No. 03502)
400 East Broadway, Suite 600
Bismarck, ND 58501
Phone: (701) 223-6585

Neff Eiken & Neff P.C.
Charles L. Neff (N.D. No. 04023)
111 East Broadway
P.O. Box 1526
Williston, ND 58801
Phone: (701) 577-8927

David R. Bossart Law Firm, P.C.
David Bossart (N.D. No. 02748)
1220 Main Avenue
Suite 123
Fargo, ND 58103
Phone: (701) 205-4773

Conlin Law Firm, LLC
Thomas J. Conlin (N.D. No. 06023)
600 Highway 169, Suite 1650
Minneapolis, MN 55426
Phone: (952) 252-0489

Counsel For Plaintiffs-Appellants

[¶1] Table of Contents

Para. No.

[¶2] Table of Authorities

Para. No.

Cases

North Dakota Century Code

Other Statutes

Other North Dakota Authorities

Other Authorities

[¶3] Issues Presented for Review

(1) **[¶4]** Is the trial court's decision holding that riparian landowners do not own the minerals (or "any proprietary interest") between the ordinary high and low watermarks on North Dakota's navigable waterways contrary to this Court's decision in State ex rel. Sprynczynatyk v. Mills, 523 N.W.2d 537 (N.D. 1994), which held that the State does not have absolute title to the shore zone but rather that riparian landowners have full shore zone interests, subject only to the State's obligations under the equal footing and public trust doctrines?

(2) **[¶5]** Does the State's interest in the "shore zone" between the ordinary high and low watermarks under the public trust and equal footing doctrines extend to mineral interests far beneath the ground, or does it instead extend only to those interests necessary to carry out the public's rights to navigation, fishing, swimming and related uses of the water and surface?

(3) **[¶6]** Did the trial court err in denying summary judgment to the owners of mineral interests between the ordinary high and low watermarks on North Dakota's navigable waterways?

(4) **[¶7]** Did the trial court err in holding that the State of North Dakota—as part of its title to the beds of navigable waterways—owns the minerals in the area between the ordinary high and low watermarks along navigable waterways and that this public title excludes ownership and any proprietary interest by riparian landowners?

(5) **[¶8]** Did the trial court err in holding that riparian landowners do not have a proprietary interest or ownership interest in the areas between the ordinary high and low watermarks along navigable waterways?

[¶9] Statement of the Case

[¶10] This case was brought by eleven named plaintiffs who own mineral rights in the "shore zone"—the land between the ordinary high and low watermarks along the Missouri River. (Appendix ("App.") at A028-A030). These plaintiffs seek to represent a class of riparian owners of shore zone mineral interests along North Dakota's navigable waterways. (App. at A031). Plaintiffs brought this action seeking, inter alia, damages, injunctive relief, and a declaration that the upland owners, not the State[1], owned the minerals beneath the shore zone of North Dakota's navigable waterways. (App. at A047-A048).

[¶11] This class action, Reep v. State, was consolidated with another action pending before the trial court, Brigham Oil v. North Dakota Board of University and School Lands. Before any discovery took place in the consolidated matters, certain parties moved for partial summary judgment on the legal issue of who owned the shore zone mineral interests. The plaintiffs in Reep v. State moved for partial summary judgment on Count I of their Complaint, seeking a judgment declaring that the individual

[1] The "State," as used herein, refers to Defendants State of North Dakota, North Dakota Board of University and School Lands, and North Dakota Trust Lands Commissioner Lance Gaebe.

named plaintiffs own title to their recorded mineral interests in lands between the ordinary high watermark and ordinary low watermark and declaring that all upland mineral owners of record own title to minerals beneath lands in the shore zone along navigable waters within North Dakota. In addition, certain parties in the Brigham case brought partial summary judgment motions seeking a declaration from the court that the riparian owners—not the State—were the rightful owners of the mineral interests in the shore zone.

[¶12] In both the Reep and Brigham Oil cases, the State of North Dakota (or its Land Board) cross-moved for partial summary judgment. In direct contravention to this Court's opinion in Mills, the State sought a judicial finding that the State held absolute title in the shore zone (including the title to subsurface minerals) and that riparian landowners along navigable waterways in North Dakota thus held no title to subsurface minerals in the shore zone.

[¶13] The trial court issued a short "order for partial summary judgment" on January 29, 2013, consolidating the two cases for the purpose of determining, by summary judgment, the question of title to the mineral estate in the shore zone. With no analysis, the court granted the State Defendants' Motion for Partial Summary Judgment and denied the

partial summary judgment motions filed by the Reep Plaintiffs in this action and by the parties in the Brigham Oil matter. (App. at A507-A508). The only basis provided by the trial court for its ruling was its conclusion that "it is the State of North Dakota—as part of its title to the beds of navigable waterways—that owns the minerals in the area between the ordinary high and low watermarks on these waterways, and that this public title excludes ownership and any proprietary interest by riparian landowners." (App. at A507).

[¶14] Following its order for partial summary judgment, on March 1, 2013, the Court ordered the entry of final judgment in the Reep v. State action, holding that its January 29, 2013 ruling in response to the parties' motions for partial summary judgment effectively resolved Counts I-V of Plaintiffs' Amended Complaint. (App. at A509-A510). Final judgment was entered pursuant to the Court's Order on March 22, 2013. (App. at A511). Plaintiffs filed their Notice of Appeal on April 11, 2013. (App. at A512).

[¶15] Statement of Relevant Facts

[¶16] By the descriptions in their mineral deeds, the eleven named plaintiffs in this action own mineral interests in the "shore zone"—the land between the ordinary high watermark set by the State Land Board and the ordinary low watermark along the Missouri River. (App. at A028-A030; A460-A467). For many years, these plaintiffs, like the other members of the class they seek to represent, have believed and relied upon the fact that they are the owners of the mineral interests in the shore zone.

[¶17] For example, Plaintiffs Stanford and Amy Reep acquired their minerals through a chain of title that included a sale from an estate. (App. at A340-A342). More than thirty years ago, the State levied an estate tax on these minerals, which was paid by the Reeps' predecessor-in-interest. (App. at A341). Upon the acquisition of their mineral interests, the Reeps recorded their interest and entered into leases on those interests. (App. at A341-A342). Although the State had collected estate taxes on the mineral interests, and although the Reeps' interests were publicly recorded, Mr. Reep then learned (not from the State, but from the lessee of his mineral interests) that the State now claimed that it owned title to those minerals, and not the Reeps. (App. at A342).

[¶18] When Mr. Reep found out that the State planned to auction off his minerals, he went to the State Trust Lands Department to stop the auction. (App. at A343-A344). But the Land Board leased Mr. Reep's minerals over his objections and despite his request that they not be leased until his claim to the minerals could be resolved. (Id).

[¶19] Unlike Mr. Reep, most mineral rights owners did not know that the State planned to lay claim to their publicly recorded oil and gas rights until after the State had already done so and the royalty checks they had been expecting failed to come. For example, Plaintiff Mary Beth Ferguson and her sisters inherited minerals from their mother and father. (App. at A391). Mrs. Ferguson signed oil and gas leases covering her rights in these minerals, and understood that it could take 10 to 12 months for royalty payments to begin. (App. at A391-A392). But when no such payments were forthcoming, she and her sister investigated and learned that—with no notice to her and her family—the State had decided to claim her minerals. (App. at A392-A393). Mrs. Ferguson had been expecting that this new royalty income would help her buy groceries and pay for medical bills and other necessities. (App. at A393). The State's unilateral actions have meant that she and her family have struggled to make ends meet. (Id).

[¶20] The mineral rights owners who have lost their interests due to the State's unlawful taking include not only private individuals like the Reeps and Mrs. Ferguson, but governmental entities such as the City of Williston and Williams County and corporations such as Upstream Innovations, Inc.—all of whom are parties in the Brigham Oil interpleader action that has been consolidated with this case for purposes of this appeal. See Brief of the Appellants, Brigham Oil v. North Dakota Board of University and School Lands, N.D. Appeal No. 20130111, Williams County Case No. 53-2011-CV-0049.

[¶21] The actions that led to the loss of the Reeps' and Mrs. Ferguson's mineral interests—and those of the class they seek to represent—are part of a recent plan by the Land Board to lease shore zone minerals belonging to private upland owners. (App. at A038-A043). The State has carried out this plan despite Attorney General (and Land Board member) Wayne Stenehjem's recognition in 2009 that "[t]here is some question about the exact nature of the state's title in the area between the ordinary high watermark and the low watermark, an area known as the 'shore zone.'" N.D. Op. Atty. Gen. 2009-L-18 at 2. "Some question" notwithstanding, the State now regularly conducts auctions to lease oil and gas rights in the shore zone, awarding leases to the highest bidder.

(App. at A446-A447). And indeed, bonus payments awarded to the State through these auctions often reach thousands of dollars per mineral acre. (App. at A448-A459). It is a scheme that the State itself knows is on the thinnest of legal foundations—but one that has already reaped millions of dollars in bonus and royalty payments for the State, all to the detriment of mineral rights owners like Mrs. Ferguson and the Reeps.

[¶22] Argument

I. [¶23] The trial court's opinion is directly contrary to this Court's opinion in Mills.

[¶24] The trial court's opinion is in direct contravention to this Court's seminal 1994 opinion in State ex rel. Sprynczynatyk v. Mills, 523 N.W.2d 537 (N.D. 1994). The trial court held that the State's "public title" to the shore zone "excludes ownership and any proprietary interest by riparian landowners." (App. at A507). That ruling contradicts the clear language of Mills, which held that the State's title to the shore zone is not "absolute." Mills, 523 N.W.2d at 543-44. Mills instead held that N.D.C.C. § 47-01-15, which states that an upland owner "takes to the edge" of the water at low watermark, means that riparian grantees have "full interests" in the shore zone; and that those interests are more than mere right of access to the water and more than riparian rights. Id. The Court in Mills, of course, also noted that the shore zone rights of riparian grantees are not unbounded: "the equal footing and public trust doctrines establish that the State cannot totally abdicate its interest to the high watermark." Id. at 543.

[¶25] The trial court's opinion, however, neither discussed nor analyzed the public trust and equal footing doctrines. Had the court below done such an analysis, it would have reached the inescapable conclusion that in North Dakota, as in every other jurisdiction in the country that has

addressed these issues, these doctrines apply only to public uses of the waters and the surface of their beds, such as swimming, boating and fishing—and not to subsurface minerals.

[¶26] Under Mills, riparian grantees have full shore zone interests, subject to the State's obligations to protect the public's rights to use the waters under the public trust doctrine. The cases cited with approval in Mills, as well as cases from across the nation, have held that the public trust doctrine protects public uses such as "navigating, boating, fishing, fowling and like public uses" but that it leaves intact for the riparian owner "proprietary privileges, among which is the right to use land for private purposes"—which include mining minerals in the shore zone. See Flisrand v. Madson, 152 N.W. 796, 801 (S.D. 1915) (cited with approval at 523 N.W.2d at 543), and State v. Korrer, 148 N.W. 617, 623 (Minn. 1914) (cited with approval at 523 N.W.2d at 543-44).

[¶27] Although the opinion below gave no hint of the reasoning behind the court's disregard of Mills, the State's briefing raised several red herring arguments. The State claimed, for example, that Plaintiffs' application of § 47-01-15 violated the anti-gift clause in the North Dakota Constitution, and that the lower court should follow the reasoning of an Oklahoma federal court in 1914 and find § 47-01-15 void. But the State

raised these same arguments nearly twenty years ago in Mills, and this Court considered and rejected them then. These discredited arguments have no more viability today than they did two decades ago.

[¶28] The trial court's denial of Plaintiffs' summary judgment motion and grant of the State Defendants' motion is a matter of *de novo* review for this Court. Twogood v. Wentz, 2001 ND 167, ¶ 11, 634 N.W.2d 514. With respect to the rights of the named Plaintiffs in this action, and of the others whom they seek to represent, the only viable course under Mills is to reverse the trial court's grant of summary judgment to the State and to remand to the trial court with a direction that judgment instead be entered for the Plaintiffs on Count I of their Complaint and for further proceedings in accordance therein.

A. [¶29] Mills holds that riparian grantees have full interests in the shore zone, subject to the State's obligations to protect the public's right to use the waters.

[¶30] In Mills, the State brought a declaratory judgment action against Mills, a riparian landowner who owned land above the high watermark of the Missouri River. The State sought a declaration that its absolute title included the land between the ordinary low watermark and the ordinary high watermark ("the shore zone"). Mills, 523 N.W.2d at 538. The trial

court granted partial summary judgment in the State's favor, holding that "[a]bsolute ownership . . . is in the state of North Dakota, subject to the private fee owner's riparian rights over the shore zone for access and for such other traditional rights as may be found to exist. Primarily, the riparian owner's rights are that of access to the water, the right to build a pier to the water, the right to accretions and the right to make reasonable use of the water." Id. Mills appealed. After conducting a detailed analysis, this Court reversed.

1. **[¶31] Upon statehood, North Dakota took title to the shore zone under the equal footing doctrine.**

[¶32] As part of its analysis, the Mills Court first traced the historical development of property interests in the beds of navigable waters. Before statehood, the Court noted, the United States held the beds of navigable waters in the Dakota Territory in trust for the future state. Mills, 523 N.W.2d at 539. Upon admission to the Union, North Dakota received title to the beds of navigable waters within the state's boundaries under the "equal footing doctrine." Id. (citing Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co., 429 U.S. 363, 369-70 (1977)).

[¶33] There is no dispute that the Missouri River is a navigable river. See Mills, 523 N.W.2d at 539, n.2; State v. Loy, 74 N.D. 182, 185, 20 N.W.2d

668, 669 (1945). North Dakota joined the Union in 1889. Enabling Act, 25 Stat. 676. Thus, in 1889, North Dakota took title to the beds of the Missouri River under the equal footing doctrine up to the ordinary high watermark on each bank, including the shore zone. See Shively v. Bowlby, 152 U.S. 1, 57-58 (1894).

2. [¶34] Upon statehood, North Dakota was free to allocate property interests in the shore zone to riparian owners, subject to its obligations under the public trust doctrine.

[¶35] Upon entering the Union on equal footing with the established States, the Mills Court explained, the rights of riparian proprietors below the high watermark were governed by local state laws, which meant that North Dakota was free to allocate the property interests in the beds of navigable waters below the ordinary high watermark. Mills, 523 N.W.2d at 539-40 (citing Barney v. Keokuk, 94 U.S. 324, 338 (1876)). There was, however, a restriction upon the State's ability to allocate property interests in the shore zone to private parties: "North Dakota could not totally abdicate its interest to private parties because it held that interest, by virtue of its sovereignty, in trust for the public." Mills, 523 N.W.2d 540 (citation omitted).

[¶36] The Court in Mills was referencing the "public trust" doctrine. As discussed more fully below, this Court has explained that, with respect to the public trust doctrine, "the purpose of a state holding title to a navigable riverbed is to foster the public's right of navigation." J.P. Furlong Enters., Inc. v. Sun Exploration & Production Co., 423 N.W.2d 130, 140 (N.D. 1988). Certain specific public uses are protected by the doctrine, including "bathing, swimming, recreation and fishing, as well as irrigation, [and] industrial and other water supplies." Id.

3. [¶37] Mills held that § 47-01-15 is a rule of construction by which riparian grantees take the interest granted to the low watermark.

[¶38] In explaining that the State could not "totally abdicate" its interests to private parties because of its public trust obligations, the Court in Mills next turned to an analysis of N.D.C.C. § 47-01-15, which states that upland owners "take to the edge of the lake or stream at low watermark." Mills alleged that under this language, he owned the shore zone, subject only to a navigational servitude. The State argued that § 47-01-15 only confirmed that riparian landowners had riparian rights in the shore zone. After a lengthy analysis, this Court concluded that § 47-01-15 is a rule of construction for determining the boundary for riparian grants. Mills, 523 N.W.2d at 541-43. It is thus not an absolute grant of ownership (as Mills

had argued), but neither is it merely a grant of riparian rights to the upland owner (as the State had argued). Id.

[¶39] Section 47-01-15 of the current North Dakota Century Code is titled "Banks and beds of streams—Boundary of ownership" and states:

> Except when the grant under which the land is held indicates a different intent, the owner of the upland, when it borders on a navigable lake or stream, takes to the edge of the lake or stream at low watermark.

N.D.C.C. § 47-01-15. (emphasis added).

[¶40] The original predecessor to this statute took effect in the Dakota Territory Civil Code of 1865, before North Dakota became a state. Mills, 523 N.W.2d at 541. Immediately upon admission into the Union in 1889, North Dakota's constitution took effect and provided that all laws in force at that time, including the predecessor to § 47-01-15, would remain in force. Id. at 542, n.6. Since 1889, the text of the predecessor to § 47-01-15 has remained a statutory provision in North Dakota. Id.; see also J.P. Furlong, 423 N.W.2d at 136, n.24.

[¶41] The Court in Mills found that the word "takes" in § 47-01-15's clause "takes to the edge of the lake or stream at low water mark" could have many shades of meaning. Mills, 523 N.W.2d at 540-41. Because of this, the Court looked to extrinsic aids to construe the language and

ascertain what type of interest the upland owner "takes" to the low watermark. Id.

[¶42] This Court noted first that there is a distinction between "take" and "own" in the contemporaneous legislation that, like § 47-01-15, was originally part of the Field Code and then the 1865 Dakota Territory Civil Code before being adopted by the new State of North Dakota. Id. at 541-42. The Court compared the use of the words "ownership" and "own" in N.D.C.C. § 47-01-14 and § 47-01-16, as well as the definition of "ownership" in another contemporaneous statutory provision, and noted that the distinction in the differing uses of these words evidences a legislative intent that "takes" as used in § 47-01-15 was not intended to be a self-executing grant of absolute ownership to the low watermark to the upland owner. Id. at 542.[2]

[¶43] To determine what the Legislature did intend by the word "takes," the Court looked to the case law, specifically, the Champlain and St. Lawrence Rail Road Co. v. Valentine, 19 Barb. 484 (N.Y. App. Div.

---

[2] The Mills Court distinguished three earlier statements from North Dakota cases declaring that "the owner of lands riparian to a navigable stream owns title to the lower water mark" as dicta. See Mills, 523 N.W.2d at 540 (distinguishing Hogue v. Bourgois, 71 N.W.2d 47, 52 (N.D. 1955); Gardner v. Green, 67 N.D. 268, 271 N.W.2d 775 (1937); and State v. Loy, 74 N.D. 182, 20 N.W.2d 668 (1945).

1853), decision. The Champlain case was annotated in the corresponding New York Field Code provision upon which North Dakota's § 47-01-15 "takes to the edge of the lake at low water mark" clause was based. Mills, 523 N.W.2d at 541. In Champlain, the New York court held that the upland owners "must be deemed the owners to low water mark, unless otherwise limited by the terms of their grants." Champlain, 19 Barb. at 492. At the same time, however, the New York court also recognized that the upland owners, who had a store building in the shore zone, could potentially be liable to the public: "if the building is an obstruction or annoyance to the common passage by the public and to navigation, it may be a public nuisance." Id.

[¶44] This Court in Mills noted that the Champlain decision showed that, as a rule of property for determining boundaries, grants of land bordering on navigable waters convey the granted interest to the low watermark, unless otherwise limited by the terms of the grants. Mills, 523 N.W.2d at 542. Consistent with Champlain, the Mills Court noted that because the Champlain court had discussed potential public nuisance issues should the upland owner obstruct the public's passage or navigation, "upland owners' grants do not authorize them to 'take' absolute ownership to the low watermark." Id.

[¶45] This Court in Mills also looked to the introductory clause in § 47-01-15, focusing on the language "the grant under which the [riparian] land is held." Id. at 542. That language, coupled with the decision in Champlain, and the contrast between the words "own" in the neighboring statutes and "takes" in § 47-01-15, led this Court to conclude that the Legislature did not intend to grant a riparian land owner absolute ownership of the shore zone. Mills, 541 N.W.2d at 542. Rather, this Court held, § 47-01-15 is a rule of construction for determining the boundary for grants of riparian land: "As a rule for interpreting conveyances, a riparian grantee 'takes' the interest that is granted in the conveying instrument to the low watermark, which is the boundary of the grantee's interest." Id. The Mills Court expressly noted that it construed § 47-01-15 in this manner to avoid an interpretation that would grant a private party a gift in violation of N.D. Const. Art. X § 18, the anti-gift clause. See Section C, infra.

[¶46] Thus, at the conclusion of this detailed analysis, this Court determined that, "absent a contrary intent in the grant itself, the 'grant under which [riparian] land is held' includes a riparian grantee's full interest in the shore zone, and necessarily precludes the State's claim of absolute ownership to the high watermark." Mills, 523 N.W. 2d at 543

(emphasis added).[3] "However," the Court continued, "the equal footing and public trust doctrines establish that the State cannot totally abdicate its interest to the high watermark, and that a riparian landowner's interest to the low watermark is not absolute." Id.

[¶47] The Plaintiffs in this action all derive their mineral interests from riparian grants. (App. at A460-A467). Section 47-01-15, as interpreted by this Court in Mills, says that, under these riparian grants, the Plaintiffs take "the interest that is granted in the conveying instrument to the low watermark." Mills, 523 N.W.2d at 542. In the words of the Mills Court, the Plaintiffs received a "full interest in the shore zone" subject only to the State's obligations under the equal footing and public trust doctrine. Id. at 543.

---

[3] Under § 47-01-15, "a riparian grantee's full interest in the shore zone" can exceed the grantor's rights in the shore zone. North Dakota had the authority to determine which of the State's shore zone rights would "attach" by rule of construction to grants of riparian land by non-State grantors, including the United States. Packer v. Bird, 137 U.S. 661, 669-70 (1891). For example, a U.S. land patent may include shore zone rights under a state rule of construction, even though the United States did not have the power to convey any rights below the ordinary high water mark. Id. (explaining that "whatever incidents or rights attach to the ownership of property conveyed by the [U.S.] government will be determined by the states"). "Under N.D.C.C. § 47-01-15, a riparian owner 'takes' more than the mere right of access to the water," Mills, 523 N.W.2d at 544, because § 47-01-15 attaches additional shore zone rights to the riparian owner's grant.

B. [¶48] The State's public trust and equal footing obligations relate to public uses of the waters, not to subsurface minerals.

[¶49] This Court in Mills was not presented with a specific use in controversy between Mills and the State, and thus did not need to rule on whether any particular interest at issue belonged to the riparian landowner or to the State. Mills, 523 N.W.2d at 544. Nonetheless, Mills makes clear which categories of interests belong to the State and which do not. The Mills Court framed the question for future courts in North Dakota with respect to the shore zone as follows: Is the interest reserved to the State in its role to preserve certain uses for the public under the equal footing and public trust doctrines? If not, then it belongs to the landowner as part of the "full interest" in the shore zone that a riparian grantee takes pursuant to § 47-01-15. Id. at 543-44.

[¶50] The scope of the public trust doctrine—that is, the list of public uses which the State must protect—is determined by state law. PPL Montana, LLC v. Montana, 132 S. Ct. 1215, 1234-35 (2012). This Court has recognized that "the purpose of a state holding title to a navigable riverbed is to foster the public's right of navigation." J.P. Furlong, 423 N.W.2d at 140. Certain specific public uses protected by the public trust doctrine include "bathing, swimming, recreation and fishing, as well as irrigation,

[and] industrial and other water supplies." Id. These uses share the common characteristic that they relate to the use of the water and of the surface land and do not relate to subsurface minerals.

[¶51] Current North Dakota Attorney General and Land Board member Wayne Stenehjem has suggested that North Dakota's public trust doctrine might extend more broadly than the public uses identified in the case law, to "natural, scenic, historic and esthetic values." N.D. Op. Atty. Gen. 2005-L-01 at 5. But no authority in North Dakota—the courts, the Attorney General, the State Engineer, or the legislature—ever has suggested that the public trust applies to subsurface minerals.[4]

1. **[¶52] Mills looked to cases from other jurisdictions which recognized that the public trust doctrine protects the right to use the water and does not extend to subsurface minerals.**

[¶53] In Mills, this Court recognized that both the State and the riparian landowner have what the Court called "correlative" interests in

[4] North Dakota's eminent domain statute further demonstrates that the scope of the public's use in North Dakota does not include subsurface minerals. It includes the specific restriction "the provisions of this section shall not authorize the state or any political subdivision thereof to obtain any rights or interest in or to the oil, gas, or fluid minerals on or underlying any estate or right in lands subject to be taken for a public use." N.D.C.C. § 32-15-03. In North Dakota, even when land is taken by the State for public use, the oil, gas, and fluid minerals remain with the private owner.

the shore zone. Mills, 523 N.W.2d at 544. In examining these correlative interests, the Court looked to cases from other jurisdictions to demonstrate how other states have viewed the public trust and equal footing doctrines.. Id. at 543-44. Like North Dakota, other states recognize that the public has the right to uses that relate to the waters' surface such as "navigating, boating, fishing, fowling, and like public uses." Flisrand, 152 N.W. at 801. Similarly, in State v. Korrer, the Minnesota Supreme Court recognized that the public's interest included navigation and "sailing, rowing, fishing, fowling, bathing, skating, taking water for domestic, agricultural, and even city purposes, [and] cutting ice." Korrer, 148 N.W. at 618. The public's interest did not however, extend to subsurface minerals. Id.

[¶54] Indeed, in Korrer, the Minnesota Supreme Court held that riparian owners owned title to the low watermark and could mine ore in the shore zone so long as they did not interfere with the public's use of the surface. Korrer, 148 N.W. at 621, 623-24. As quoted by this Court in Mills, the Minnesota court held that the riparian owner's title was "qualified by the right of the public to use the same for the purpose of navigation or other public purpose . . . Restricted only by that paramount public right the riparian owner enjoys proprietary privileges, among which is the right to use the land for private purposes." Id. at 623. The Minnesota court held

that those "proprietary privileges" and "private purposes" enjoyed by the riparian owner included mining ore in the shore zone. Id.

[¶55] In Flisrand v. Madson, also cited by Mills, the South Dakota Supreme Court addressed ownership in the shore zone under a statute nearly identical to N.D.C.C. § 47-01-15. Flisrand, 152 N.W. at 798-99 (quoting S.D. Civil Code § 289); see S.D. Codified Laws § 43-17-2. Applying the statute, the South Dakota court held that the upland owner's title extended to the low watermark but was limited by the public trust. Flisrand, 152 N.W. at 800. Flisrand articulated the scope of the public trust with a list of rights relating only to the surface: "[t]he plaintiff [riparian owner] . . . has the right to use such shore in all ways that he may desire, so long as and with the exception that he does not interfere with or prevent the public from also using or having access to the same for the purpose for which the public has a right to use it, viz., navigating, boating, fishing, fowling, and like public uses." Id. at 801 (emphasis added).

2. [¶56] No state has found that the public trust over navigable waters protects subsurface minerals.

[¶57] Like Flisrand and Korrer, cases in other jurisdictions have uniformly applied the public trust doctrine to the public's use of the waters and the surface of their beds. No state has found that the public

trust over navigable waters protects a public right to exploit subsurface minerals.

[¶58] In fact, like Korrer, all states that have considered the relationship between subsurface minerals and the public trust doctrine have found that these minerals fall outside the scope of the public trust. For example, the Alaska Supreme Court has explicitly stated "we reject [the] contention that mining is a public trust purpose." Hayes v. A.J. Assocs., 846 P.2d 131, 133 (Alaska 1993). That court explained that the "commerce" contemplated by the public trust "implies commerce in the sense of trade, traffic or transportation of goods over navigable waters, a meaning which does not include mining." Id.

[¶59] Similarly, the Mississippi Supreme Court determined that "the values of the underlying mineral estate were not involved" in the public trust at common law. Treuting v. Bridge & Park Comm'n of Biloxi, 199 So. 2d 627, 633 (Miss. 1967). And, the California Supreme Court expressly rejected a taxpayers' claim that the state could not have lawfully conveyed minerals beneath navigable waters because those minerals were held in a sovereign capacity for the public as a whole. City of Long Beach v. Marshall, 82 P.2d 362, 364-65 (Cal. 1938).

[¶60] The basic public uses of the surface protected by the public trust, such as navigation and fishing, have been recognized uniformly across the country. See, e.g., Yoffee v. Penn. Power & Light Co., 123 A.2d 636, 644 (Pa. 1956) (recognizing navigation and fishing rights in Pennsylvania); Tex. River Barges v. City of San Antonio, 21 S.W.3d 347, 352 (Tex. App. 2000) (recognizing same in Texas); Glass v. Goeckel, 703 N.W.2d 58, 74 (Mich. 2005) (recognizing same, among others, in Michigan). Some states, like Connecticut, have enumerated specific lists of public uses within the public trust. Town of Orange v. Resnick, 109 A. 864, 866 (Conn. 1920) (describing "public rights of fishing, boating, hunting, bathing, taking shellfish, gathering seaweed, cutting sedge and of passing and repassing"). In other states, the public trust encompasses additional public rights, such as the preservation of lands in their natural state, and "the preservation of the natural, scenic, historic and esthetic values of the environment." See Just v. Marinette County, 201 N.W.2d 761, 768-69 (Wis. 1972), and Payne v. Kassab, 312 A.2d 86, 93 (Pa. 1973).

[¶61] Plaintiffs submitted with their summary judgment briefing the Affidavit of Joseph Sax,[5] the nation's pre-eminent riparian property rights

[5] Professor Sax's publications have been cited and quoted with approval in North Dakota Supreme Court opinions and North Dakota Attorney

historian who has extensively studied the public trust doctrine. (App. at A402-A404). Professor Sax concluded that all jurisdictions that have addressed the public trust doctrine agree that the public trust only embraces uses and activities that can be commonly enjoyed by the public at large, whether these uses are traditional, such as navigation and fishing, or more contemporary, such as recreation, ecosystem protection or sunbathing and picnicking on the sand. (App. at A410-A412). What are distinctly not recognized as public trust uses are general economic activities that could produce revenues for the public. (App. at A412). Professor Sax notes that this exclusion is so well accepted as a matter of public trust law that it has rarely been raised in litigation. (Id).

3. [¶62] Under the equal footing doctrine, lands along navigable waters were held in trust for public use, not as economic assets.

[¶63] The uniform treatment of the public trust doctrine as relating only to the surface, and not the subsurface, is consistent with the history of public trust lands along navigable waters. As Professor Sax noted, these lands have a unique history as compared to other state-owned lands.

General Opinions. United Plainsmen Ass'n v. N.D. State Water Conservation Comm'n, 247 N.W.2d 457, 463 (N.D. 1976); N.D. Op. Atty. Gen. 2005-L-01 at 4, 7; N.D. Op. Atty. Gen. 2006-L-23 at 4, n.22. Plaintiffs submitted this testimony from Professor Sax to the trial court to give a nationwide perspective on the history and application of the public trust doctrine.

(App. at A416-A419). Under the equal footing doctrine, before each state entered the Union, the U.S. government held these lands in trust for the future state—not as economic assets, but for public use. (App. at A406-A408). In contrast, other lands (not along navigable waters) were transferred to the states by the U.S. government for economic development, and the states held such lands for the economic benefit of the public. (App. at A417-A419). Because the states did not receive public trust lands for economic benefit, they have no obligation to retain those lands for the economic benefit of the public. Rather, states have only the public trust obligation to protect the public's use of the water and the surface of the bed. (App. at A408-A412).

4. [¶64] The State's interests in the shore zone under the public trust and equal footing doctrine do not include Plaintiffs' mineral rights.

[¶65] This case now presents the Court with a specific issue that was not before the Court in Mills. But this Court already laid the foundation twenty years ago for a decision on behalf of the Plaintiffs and the class of mineral rights owners they seek to represent.

[¶66] As noted above, under the equal footing doctrine, the land along navigable waterways was held in trust for future states—not for the

economic benefit of the public, but to protect the use of the waterways for the public. (App. at A412). This Court has said that under the public trust doctrine, states have the obligation to do just that—preserve the waterways "to foster the public's right of navigation" and to protect uses such as "bathing, swimming, recreation and fishing, as well as irrigation, [and] industrial and other water supplies." J.P. Furlong, 423 N.W.2d at 140. No state in the country has extended this public trust to mineral interests. And indeed, those that have specifically considered the issue of mineral interests, including the Minnesota Supreme Court in Korrer (cited with approval by this Court in Mills), all have held that those interests belong to upland riparian owners—not the state.

[¶67] There is no basis under Mills, the cases it cites, or the long history of the equal footing and public trust doctrines in North Dakota and the rest of this country, upon which to find that the State has title to shore zone mineral interests. The Plaintiffs, as riparian grantees, are the rightful owners of the shore zone mineral interests.

C. [¶68] Mills resolved the constitutionality of § 47-01-15.

[¶69] Mills considered and resolved the State's arguments relating to the proper interpretation of § 47-01-15 in view of the North Dakota Constitution, including the anti-gift clause. Mills, 523 N.W.2d at 542-43.

There are no legal grounds upon which this Court should now find unconstitutional a statute that has been a part of North Dakota's laws for the past 124 years. But because the State raised its constitutional arguments below, Plaintiffs will briefly address them here.

[¶70] Mills concluded that § 47-01-15 is a rule for interpreting conveyances by which a riparian grantee "takes" the interest that is granted to the low watermark, which thus becomes the boundary of the grantee's interest. Mills, 523 N.W.2d at 542. Section 47-01-15, as so construed, has the effect of providing riparian grantees with certain rights in the shore zone—which means that the State abdicated some, but not all, of the rights it acquired under the equal footing doctrine.

1. [¶71] North Dakota joins numerous other states in providing riparian grantees with rights to the low watermark.

[¶72] Other states have made choices similar to that made by North Dakota and have provided upland owners with more than riparian rights to the low watermark, subject to the public trust in the shore zone. Mills, 523 N.W.2d at 542-44. Some did so by statutes nearly identical to § 47-01-15; others by common law. (App. at A408-A410). North Dakota's choice therefore is not unique or even unusual.

[¶73] Mills quoted with approval cases from several jurisdictions that, like North Dakota, have recognized that upland owners have full interests in the shore zone, subject only to the state's public trust obligations. As noted above, Mills relied on and quoted heavily from the Korrer and Flisrand decisions from Minnesota and South Dakota. Mills, 523 N.W.2d at 543 (citing and quoting Korrer, 148 N.W. at 623; Flisrand, 152 N.W. at 801). In addition, Mills also cited cases from California and Montana, both of which have statutes similar to § 47-01-15. See Mills, 523 N.W.2d at 543 (citing State v. Superior Court of Lake County, 29 Cal. 3d 210, 172 Cal. Rptr. 696, 625 P.2d 239, cert. denied, 454 U.S. 865 (1981); Montana Coal. for Stream Access, Inc. v. Curran, 682 P.2d 163 (Mont. 1984)).

[¶74] In addition to the jurisdictions expressly cited in Mills, other states also have chosen to transfer certain shore zone interests to upland owners. Several have done so by common law. For example, Missouri's common law gives title to upland owners to the low watermark. Sibley v. Eagle Marine Indus., 607 S.W.2d 431, 435 (Mo. 1980). As another example, "[i]n Delaware, a riparian owner of land fronting on navigable water holds title to the low watermark and, therefore, owns the foreshore . . ." State ex rel. Buckson v. Penn. R.R. Co., 267 A.2d 455, 457 (Del. 1969). The Supreme Court of Maine noted: "[i]n Maine, Massachusetts, and Virginia, states

whose common law was influenced by colonial ordinances from the 17th Century . . . private property immediately adjacent to the ocean extends past the mean high-water demarcation to the mean low-water mark, a historical artifact of the British and colonial attempts to encourage commercial wharf development at private expense." McGarvey v. Whittredge, 28 A.3d 620, 626 (Me. 2011) (citing Bell v. Town of Wells, 510 A.2d 509, 513-15 (Me. 1986); Trio Algarvio, Inc. v. Comm'r of the Dep't of Envtl. Prot., 795 N.E.2d 1148, 1150-51 (Mass. 2003); Taylor v. Commonwealth, 47 S.E. 875, 879-80 (Va. 1904); State ex rel. Buckson, 267 A.2d at 459.)[6]

2. [¶75] Section 47-01-15 does not violate the North Dakota Constitution's anti-gift clause.

[¶76] Although Mills recognized that the effect of the adoption of § 47-01-15 meant that the State had "resign[ed] to the riparian proprietor" certain rights that it had held in its sovereign capacity, Mills held that

[6] Of course, just as states were free to "resign to the riparian proprietor rights which properly belong to [the state] in [its] sovereign capacity" (see Mills, 523 N.W.2d at 539), so too were states free to retain their interests in the shore zone by drawing the line at the high watermark instead of transferring those interests to private owners. See, e.g., Lewis and Jackson v. Keeling, 46 N.C. 299, 306 (N.C. 1854) (finding that, under North Carolina law, upland owners own only to the high watermark). None of those states enacted a statute like N.D.C.C. § 47-01-15.

because § 47-01-15 was a rule of construction for determining the boundary for grants of riparian land—and not in itself an absolute grant of ownership to the low watermark—the statute did not violate the anti-gift clause of the North Dakota Constitution. See Mills, 523 N.W.2d at 539, 542-43. This Court therefore disagreed with the State's argument that the anti-gift clause of the North Dakota Constitution would not permit riparian owners to take any interest in the shore zone under § 47-01-15.

[¶77] North Dakota's "anti-gift clause" was adopted as § 185 of the North Dakota Constitution, and stated:

> Neither the State nor any county, city, township, town, school district or any other political subdivision shall loan or give its credit or make donations to or in aid of any individual, association or corporation, except for necessary support of the poor, nor subscribe to or become the owner of the capital stock of any association or corporation, nor shall the State engage in any work of internal improvement unless authorized by a two-thirds vote of the people.

The clause remains, in substantially the same form, as Article X, § 18 of the current North Dakota Constitution. Both versions prohibit donations to an "individual." Section 185 was adopted to prohibit the State "from making donations or giving or loaning credit to aid in the construction of railroads or other internal improvements." Haugland v. City of Bismarck, 2012 ND 123, ¶ 27, 818 N.W.2d 660.

[¶78] Section 47-01-15 did not bestow a gift upon any "individual," and therefore did not violate the anti-gift clause. Instead, § 47-01-15 is "a rule for interpreting conveyances" that applies to all conveyances of land intersected by a navigable waterway. Mills, 523 N.W.2d at 542-43. The statute does not exclude any citizen or entity from obtaining shore zone rights by conveyance. This "avoid[s] an interpretation that would grant a private party"—that is, an "individual"—"a gift in violation of the anti-gift clause of our state constitution." Id.

[¶79] Mills cited two cases relating to the anti-gift clause, and the State relied on both in the proceedings below in re-raising its anti-gift argument: Solberg v. State Treasurer, 78 N.D. 805, 53 N.W.2d 49 (1952), and Herr v. Rudolf, 75 N.D. 91, 25 N.W.2d 916 (1947). Both cases addressed statutes providing for the conveyance of real property interests from the State to individuals. Solberg, 78 N.D. at 809-10, 53 N.W.2d at 50-51; Herr, 75 N.D. at 95-97, 25 N.W.2d at 918-19. The statute at issue in each case created a privileged class of "individuals" who could obtain the property interests at either reduced or zero consideration, while the population as a whole did not enjoy the same benefit. As Solberg articulated, the statute in question "has the effect of transferring to certain designated classes or individuals property of the state." 78 N.D. at 814, 53

N.W.2d at 53-54 (emphasis added). Likewise, in Herr the statute constituted "a donation to a privileged buyer." 75 N.D. at 102, 25 N.W.2d at 922 (emphasis added).

[¶80] Section 47-01-15 does not create any privileged class, and therefore it does not provide a gift to any "individual" and is not affected by the holdings of Solberg and Herr. Enactment of § 47-01-15 did not constitute "a self-executing grant of absolute 'ownership' to the low watermark" to existing riparian owners. Mills, 523 N.W.2d at 542. Instead, it applies equally to all classes and individuals as a rule of construction to every conveyance of riparian land. Id. at 542-43. Thus, as Mills held, § 47-01-15 does not violate the anti-gift clause. The State's anti-gift arguments must once again be dismissed.

[¶81] Similarly, as Mills held, because § 47-01-15 is a rule for interpreting conveyances of riparian land occurring after statehood, it is not "void" for any of the reasons outlined in the line of federal Oklahoma cases beginning with United States v. Mackey, 214 F. 137 (E.D. Okla. 1913). See Mills, 523 N.W.2d at 542, n.6. There is no basis to alter this Court's analysis and holding from nearly twenty years ago. This Court should thus reject any renewed attempt by the State to question the constitutionality

and/or legality of a statute that has been part of North Dakota's laws for the past 124 years.

[¶82] Conclusion

[¶83] As riparian grantees, the Plaintiffs are entitled to their full interests in the shore zone, subject only to the State's obligations under the equal footing and public trust doctrines. The purpose of these doctrines is clear—it is to preserve for the public the rights to use the waters and the surface of the beds. No state has found that the public trust over navigable waters protects a public right to exploit subsurface minerals. Rather, such rights belong to the riparian grantee as part of an upland owner's "proprietary privileges, among which is the right to use land for private purposes." See Korrer, 148 N.W. at 623.

[¶84] Plaintiffs respectfully request that this Court follow the path laid down nearly twenty years ago in Mills and reverse the trial court's grant of summary judgment to the State. Plaintiffs seek a remand to the trial court with a direction that judgment instead be entered for the Plaintiffs on Count I of their Complaint and for further proceedings in accordance therein.

[¶85] Dated: May 21, 2012

Respectfully submitted,

Robins, Kaplan, Miller & Ciresi L.L.P.

By: */s/ Jan M. Conlin*
Jan M. Conlin (N.D. No. 07268)
Richard B. Allyn (P01120)
Sara A. Poulos (P001140)
Aaron R. Fahrenkrog (P01122)
2800 LaSalle Plaza
800 LaSalle Avenue
Minneapolis, MN 55402
Phone: (612) 349-8500

Crowley Fleck PLLP
John Morrison (N.D. No. 03502)
400 East Broadway, Suite 600
Bismarck, ND 58501
Phone: (701) 223-6585

Neff Eiken & Neff P.C.
Charles L. Neff (N.D. No. 04023)
111 East Broadway
P.O. Box 1526
Williston, ND 58801
Phone: (701) 577-8927

David R. Bossart Law Firm, P.C.
David Bossart (N.D. No. 02748)
1220 Main Avenue
Suite 123
Fargo, ND 58103
Phone: (701) 205-4773

Conlin Law Firm, LLC
Thomas J. Conlin (N.D. No. 06023)
600 Highway 169, Suite 1650
Minneapolis, MN 55426
Phone: (952) 252-0489

[¶86] Certificate of Compliance on Word Count

[¶87] The above-signed counsel certify that this brief complied with Rule 32(a)(7)(A); the word count is 7,896.

[¶88] Certificate of Word Processing Program

[¶89] The above-signed counsel certify that the word processing program is Microsoft Word 2010.

[¶90] Request for Oral Argument

[¶91] On account of the statewide importance of the issues presented in this appeal, the Appellants request that oral arguments be permitted in this case, pursuant to Rule 34 of the North Dakota Rules of Appellate Procedure.

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Stanford A. Reep and Amy Reep, the Stockman Family Mineral Trust, the Charles and Ruth Patch Trust, Heidi McGillivray, Julia Streich, Mary Beth Ferguson, Florence Irwin *ex rel*. Loren Irwin, her guardian and conservator, and Loren Irwin, Individually, Thomas Selby, and Sogard Davidson Mineral LLLP, and on Behalf of All Others Similarly Situated Appellants, vs. State of North Dakota, North Dakota Board of University and School Lands; and North Dakota Trust Lands Commissioner Lance D. Gaebe, in his official and personal capacities Appellees,	**Supreme Court No. 20130110** **CERTIFICATE OF SERVICE**

On May 21, 2013, the Brief of the Appellants was electronically filed with the Clerk of the North Dakota Supreme Court via e-mail from Sara A. Poulos to SupClerkofCourt@ndcourts.gov, pursuant to Rule 25 of the North Dakota Rules of Appellate Procedure and Supreme Court Administrative Order 14, and sent by Sara A. Poulos via e-mail to the following:

Lawrence Bender	lbender@fredlaw.com
Charles M. Carvell	cmc@pearce-durick.com
Randall (R.T.) Cox	rt@coxhorning.com
Peter H. Furuseth	pete@furusethlaw.com
Greg W. Hennessy	integrated@nemontel.net
Hope L. Hogan	hhogan@nd.gov
Dennis E. Johnson	dennis@dakotalawdogs.com

Amy L. De Kok	adekok@fredlaw.com
Carolyn A. Kvislen	ckvislen@nd.gov
Charles Neff	cneff@nefflawnd.com
Kent A. Reierson	kreierson@crowleyfleck.com
Michael D. Schoepf	mschoepf@fredlaw.com
Jennifer L. Verleger	jverleger@nd.gov
Marlyce A. Wilder	marlycew@co.williams.nd.us
Gary Schwab	gschwab@heylroyster.com
Shirley Schwab	rschwab@aol.com
Lois Zeigler	loiszg123@comcast.net

On May 21, 2013, a copy of this document was sent by Andrew J. Pieper via e-mail to the following:

David Bossart	david@bossartlaw.com
Malcolm H. Brown	mhblaw@btinet.net
Thomas Conlin	tom@conlinlawfirm.com
Scott M. Knudsvig	sknudsvig@srt.com
Charles Neff	cneff@nefflawnd.com

On May 21, 2013, a copy of this Certificate of Service was electronically filed with the Clerk of the North Dakota Supreme Court via e-mail from Andrew J. Pieper to SupClerkofCourt@ndcourts.gov, and sent by Andrew J. Pieper via e-mail to all of the above-identified recipients.

DATED: May 21, 2013

By: */s/ Sara A. Poulos*
Sara A. Poulos

By: */s/ Andrew J. Pieper*
Andrew J. Pieper

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Stanford A. Reep and Amy Reep, the Stockman Family Mineral Trust, the Charles and Ruth Patch Trust, Heidi McGillivray, Julia Streich, Mary Beth Ferguson, Florence Irwin *ex rel*. Loren Irwin, her guardian and conservator, and Loren Irwin, Individually, Thomas Selby, and Sogard Davidson Mineral LLLP, and on Behalf of All Others Similarly Situated Appellants, vs. State of North Dakota, North Dakota Board of University and School Lands; and North Dakota Trust Lands Commissioner Lance D. Gaebe, in his official and personal capacities Appellees,	**Supreme Court No. 20130110** **CERTIFICATE OF SERVICE**

I hereby certify that on May 28, 2013, a copy of the Appendix was sent via e-mail to the following:

Lawrence Bender	lbender@fredlaw.com
David Bossart	david@bossartlaw.com
Malcolm H. Brown	mhblaw@btinet.net
Charles M. Carvell	cmc@pearce-durick.com
Thomas Conlin	tom@conlinlawfirm.com
Randall (R.T.) Cox	rt@coxhorning.com
Peter H. Furuseth	pete@furusethlaw.com
Greg W. Hennessy	integrated@nemontel.net
Hope L. Hogan	hhogan@nd.gov
Dennis E. Johnson	dennis@dakotalawdogs.com
Scott M. Knudsvig	sknudsvig@srt.com
Amy L. De Kok	adekok@fredlaw.com
Carolyn A. Kvislen	ckvislen@nd.gov

Charles Neff	cneff@nefflawnd.com
Kent A. Reierson	kreierson@crowleyfleck.com
Michael D. Schoepf	mschoepf@fredlaw.com
Jennifer L. Verleger	jverleger@nd.gov
Marlyce A. Wilder	marlycew@co.williams.nd.us
Gary Schwab	gschwab@heylroyster.com
Shirly Schwab	rschwab@aol.com
Lois Zeigler	loiszg123@comcast.net

DATED: May 28, 2013

By: */s/ Andrew J. Pieper*
Andrew J. Pieper